In The Matter Of:

United States vs.
PFC Bradley E. Manning

Vol. 8

June 18, 2013

UNOFFICIAL DRAFT - 6/18/13 Morning Session

Provided by Freedom of the Press Foundation

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1   VOLUME VIII

2   IN THE UNITED STATES ARMY

3

4   UNITED STATES

5   VS.

6   MANNING, Bradley E., PFC   COURT-MARTIAL

7   U.S. Army, xxx-xx-9504

8   Headquarters and Headquarters Company,

9   U.S. Army Garrison,

10 Joint Base Myer-Henderson Hall,

11 Fort Myer, VA 22211

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15   The Hearing in the above-entitled matter was

16 held on Monday, June 18, 2013, commencing at 9:30 a.m.,

17 at Fort Meade, Maryland, before the Honorable Colonel

18 Denise Lind, Judge.

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 1                        DISCLAIMER

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 4   who is not the official Government reporter, was not

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16   that do not make sense, and missing testimony or

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 1   APPEARANCES:

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 3            ON BEHALF OF GOVERNMENT:

 4                MAJOR ASHDEN FEIN

 5                CAPTAIN JOSEPH MORROW

 6                CAPTAIN ALEXANDER VON ELTEN

 7

 8            ON BEHALF OF ACCUSED:

 9                DAVID COOMBS

10                CAPTAIN JOSHUA TOOMAN

11                MAJOR THOMAS HURLEY

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1   PROCEEDINGS,

2   THE COURT: Court is called to order. Let

3   the record reflect all parties present when the court

4   last recessed.

5   All right. The court has prepared an order,

6   review of stipulations of expected testimony, dated 18

7   June 2013 with a suspension date of three business or

8   duty days.

9   One. To date the government has introduced

10   stipulations of expected testimony of 33 government

11   witnesses. Those stipulations have been admitted into

12   evidence and read on the record. The parties notified

13   the court they anticipate entering into approximately 17

14   additional stipulations of expected testimony by 21 June

15   2013.

16   Two. The government notified the court that

17   government organizations with equities involved have

18   requested to review certain stipulations of expected

19   testimony before they are admitted into evidence and read

20   on the record. The government wishes to accommodate this

21   request and proposes to have those stipulations signed by

1   the parties before sending them to the government

2   organizations for review. Defense does not object.

3   Order. One. The court approves the

4   government's request for the requested reviews so long as

5   the reviews do not unreasonably delay the trial. All

6   reviews of stipulations of expected testimony will be

7   completed within three duty or business days after the

8   party and the accused enter into the stipulation.

9   Two. This order is issued under the court's

10 authority to regulate the proceedings under Rules of

11 Court-Martial 801 and to compel the production of

12 witnesses under Rule for Court-Martial 703. Should any

13 government organization request to review a stipulation

14 and fail to conduct this review within this timeframe,

15 the government will elect to offer the stipulation into

16 evidence, call the subject witness, or forego the use of

17 the testimony in the government's case in chief. So

18 ordered this 18th day of June, 2013.

19   Please add that as the next appellate exhibit

20 in line. Is there anything else we need to address

21 before we proceed to argue the motion?

 1   MR. FEIN: Your Honor, just two

 2   administrative issues. First, yesterday what has been

 3   marked as appellate exhibit 572 has been filed with the

 4   court, witness list order and proposed PE of government

 5   witnesses, dated 17 June which included the 17

 6   stipulations you just referenced in your order, that's

 7   been marked as appellate exhibit 572.

 8   Also this morning, Your Honor, as of this

 9   morning's start of court there are nine media members in

10   the media room, one stenographer in the media room, four

11   members of the media in the courtroom, four spectators in

12   the courtroom, and currently no one in the trailer but it

13   is available.

14   THE COURT: All right. Thank you.

15   At issue are the defense objections to

16   prosecution exhibits 31, 32 and 109, prosecution exhibits

17   for identification. And I believe the objections were

18   authentication, hearsay and relevance, is that correct?

19   MR. COOMBS: That's correct, ma'am.

20   THE COURT: All three of the exhibits?

21   MR. COOMBS: Yes, ma'am.

 1   THE COURT: I've already admitted prosecution
 2 exhibit 110 for identification.
 3   Government, as you have the burden of proof,
 4 would you like to proceed?
 5   MR. von ELTEN: Yes, ma'am.
 6   THE COURT: Let's go exhibit by exhibit if we
 7 will.
 8   Before you start, can I ask, I'll ask the
 9 defense this as well, for prosecution exhibits 31 and 32
10 for identification will the arguments be the same?
11   MR. von ELTEN: Similar, ma'am.
12   THE COURT: But different?
13   MR. von ELTEN: But different.
14   THE COURT: Go ahead.
15   MR. von ELTEN: Your Honor, the United States
16 believes it's made a prima facie showing of
17 authentication and therefore all defense arguments should
18 go to weight and not admissibility. I'll start off with
19 the internet archive, ma'am.
20   THE COURT: I would prefer if you would do
21 plaintiff's exhibits 31 and 32 first. Can you do that?

1   MR. von ELTEN: Yes, ma'am.

2   THE COURT: Thank you.

3   MR. von ELTEN: Prosecution exhibit 31 for

4 identification, ma'am, is a tweet. The United States

5 offers it as a tweet from WikiLeaks requesting dot mil

6 email addresses.

7   To lay out the history of how Agent Mander

8 collected it, Agent Mander testified that he collected

9 that information witness statement in two different ways.

10 First Agent Mander testified that he went to WikiLeaks

11 personally a year ago, WikiLeaks Twitter account at

12 Twitter dot com, and actually saw the tweet located

13 directly on the website. Then Agent Mander testified

14 that he more recently went to a Google cache version and

15 searched for it and located it. He testified that he

16 compared it to and found the contents to be the same.

17   Agent Mander testified that he's familiar

18 with Google cache as something that saves the result and

19 makes it accessible for viewing. Agent Mander also

20 testified that he uses Google cache in his official

21 capacity as a CID agent and uses it regularly.

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 1              Therefore, Agent Mander authenticated the

 2    prosecution exhibit 31 for identification based on his

 3    own personal knowledge.

 4              Furthermore, Agent Mander testified about the

 5    identifying characteristics of the email tweet.  He

 6    talked about the logo, the location where he found it on

 7    Twitter dot com, the account name being WikiLeaks, and

 8    the content of the tweets all being relevant, things that

 9    would make it WikiLeaks.

10              Furthermore, the Twitter account under

11    WikiLeaks is deemed as (INAUDIBLE) making it more likely,

12    making it WikiLeaks account making it (INAUDIBLE).

13    Because the tweet is authenticated under Agent Mander's

14    testimony, any evidence of the defense wishes to offer

15    should go to weight, not admissibility.

16              As for hearsay, Your Honor, the United States

17    offers PE 31 for identification for effect on listener.

18    Specifically we're offering it to explain PFC Manning's

19    course of action.  On 7-8-2010, WikiLeaks posted a tweet

20    asking for dot mil email addresses.  Special Agent

21    Williamson testified that there were five files related
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1   to the dot mil email addresses located on the computer to

2   which PFC Manning had access. The files were, quote,

3   recreated and deleted on May 13, 2010, and in between

4   deleting and creating (INAUDIBLE) the user of the Peter

5   Bigelow account also viewed the Bradley Manning Gmail

6   email inbox.

7   THE COURT: Who is the witness who testified

8   to this?

9   MR. von ELTEN: Special Agent Wilson, ma'am.

10   The email tweet is relevant because it makes

11 it more likely that PFC Manning's intent was to

12 compromise the dot mil email addresses and information

13 related to them.

14   The evidence also corroborates PFC Manning's

15 admissions that he performed significant research into

16 WikiLeaks and that he talked about compromised

17 information with Mr. Lamo.

18   Prosecution exhibit 32 for identification,

19 the authentication arguments are the same, ma'am.

20   The hearsay explanation is slightly

21 different. The United States is offering this to explain

 1 the nature of WikiLeaks possession and it's appropriate

 2 in this case for non-hearsay use from United States V

 3 Ellison.

 4   THE COURT: Stop there again. Prosecution

 5 exhibit 32.

 6   MR. von ELTEN: It's the video tweet,

 7 WikiLeaks saying they have an encrypted video of bomb

 8 strikes on civilians.

 9   THE COURT: They have encrypted video.

10   MR. von ELTEN: Of bomb strikes on video and

11 they need super computer time.

12   THE COURT: And the non-hearsay basis is.

13   MR. von ELTEN: The non-hearsay basis is

14 explanation of the nature of the possession for

15 WikiLeaks. WikiLeaks admits to having the video and

16 needing it to be decrypted which is evidence that they

17 don't have lawful possession of it. This is relevant

18 because --

19   THE COURT: How does that not go to the truth

20 of the matter asserted?

21   MR. von ELTEN: Because under United States V

1 Ellison, possession of stolen goods, the explanation of

2 the nature of it is admissible in a non-hearsay way as

3 part of the res gestae.

4   THE COURT: What does res gestae have to do

5 with hearsay?

6   MR. von ELTEN: Your Honor, in this case the

7 case history discusses res gestae which talks about in

8 many cases historical forerunners to modern hearsay

9 objections, and in this case the statement about the

10 possession and the nature of it is treated as almost an

11 operative fact.

12   THE COURT: So this is United States versus

13 Elliott you're talking about?

14   MR. von ELTEN: Yes, ma'am. Sorry. Elliott.

15   THE COURT: The one cited in your brief.

16   MR. von ELTEN: Yes, ma'am. 23 M.J. 1.

17   THE COURT: Okay.

18   MR. von ELTEN: It's relevant because it's

19 evidence of the timing of transmission by PFC Manning.

20 The transmission is analogous to a stolen good here in

21 the WikiLeaks case because they had unauthorized

1   possession of it.

2   The evidence corroborates PFC Manning's

3   admissions where he explicitly says to Mr. Lamo that

4   WikiLeaks has the video. PFC Manning tells Mr. Lamo that

5   WikiLeaks has the encrypted video. PFC Manning also

6   tells Mr. Lamo that WikiLeaks is unable to decrypt the

7   video.

8   The tweet is also relevant to the timing of

9   the transmission. United States has charged transmission

10   between 1 November and 8 January of the BE22PAX video.

11   United States has presented evidence that the video was

12   encrypted, had the same hash value as the video in the

13   CENTCOM server, and that video existed outside of the

14   United States' possession. And this tweet corroborates

15   that as well.

16   This is also relevant to PFC Manning's

17   knowledge of WikiLeaks' plan to compromise classified

18   information. PFC Manning did extensive research on

19   WikiLeaks on the SIPRNET, on Intelink, he talked about it

20   with Mr. Lamo, he talked about it with pressassociation,

21   and Mr. Lamo testified that pressassociation has been

 1   associated with Mr. Assange.

 2   THE COURT: You also have that it's relevant

 3   to PFC Manning's knowledge of the scope of the disclosure

 4   to Article 104. Please talk about that.

 5   MR. von ELTEN: Well, ma'am, if WikiLeaks has

 6   a plan to compromise classified information, and PFC

 7   Manning is aware of that plan, it makes his knowledge of

 8   when he gives information to WikiLeaks more likely that

 9   he knows what the effect of those compromises will be.

10   Furthermore, when there's evidence of a plan

11   it is evidence that -- that evidence can also be used as

12   proof of subsequent acts. So in this case where

13   WikiLeaks has a plan to compromise information, that is

14   evidence that they will compromise classified information

15   in the future going forward.

16   And, ma'am, Special Agent Mander also

17   testified that both of the tweets are still presently on

18   Twitter and that he -- as of the first week of June 2013.

19   THE COURT: All right.

20   MR. von ELTEN: Regarding prosecution exhibit

21   10 for identification which is the Internet archive

1 record, ma'am, United States offers that as a

2 self-authenticating record under 902.11. United States

3 has presented an affidavit stating that the record was

4 made at or near the time of the occurrence set forth, it

5 was kept in the regular course of business and it was

6 made as part of a regularly conducted activity.

7   THE COURT: So are you offering it as a

8 business record?

9   MR. von ELTEN: Yes, ma'am. Which goes into

10 my next point that it qualifies under business records

11 exception hearsay for the same reasons.

12   THE COURT: The defense brief talks about the

13 organization having, using a different standard affidavit

14 than the one they used in this case. Can you talk about

15 that?

16   MR. von ELTEN: Yes, ma'am. The United

17 States gave the Internet Archive a standard military

18 justice form, gave it to them, gave it time to read it

19 and send it back. It was just for the (INAUDIBLE) forms

20 used in normal practice. The content of the form

21 provided or the affidavit provided by the United States

1 is substantially similar to the content of the form of

2 the sample affidavit, and it's also, the content is the

3 same for self-authentication purposes as the affidavit

4 presented by the defense as well.

5   THE COURT: Number two in the attestation

6 certificate says that the electronic systems involved can

7 accurately record and reflect the files were captured at

8 or near the time of the date reflected in the URL

9 assigned to each file by virtue of the automatic transfer

10 of electronic data. And then number three says such

11 records were captured by Internet Archive or received

12 from third-party donors. How does this affidavit

13 accurately reflect what a third-party donor gave?

14   MR. von ELTEN: Ma'am, there are two points.

15 One. The Internet archive integrates these results into

16 their own and therefore adopts them.

17   THE COURT: How does that show that they're

18 accurate? They just take whatever the third-party gives

19 them.

20   MR. von ELTEN: Also in Novack, which is

21 cited by the defense, the case discusses how these

1 third-party donations originate and it's done by web

2 crawling crawlers which are automated processes, and

3 automated processes have a lower standard of authenticity

4 under Lubich.

5   THE COURT: Lubich addressed web crawlers?

6   MR. von ELTEN: It addressed automated

7 processes.

8   THE COURT: So they have a lower standard of

9 authenticity?

10   MR. von ELTEN: Ma'am, in Lubich an unknown

11 analyst created a report, created, put information on the

12 CDs that an agent then testified about the contents of

13 those CDs, and the agent had some familiarity, but he

14 didn't have personal knowledge of the automated process,

15 and he testified that he knew it was automated and that

16 he took the data and analyzed it himself.

17   That is analogous to what's happened here

18 where Internet Archive has adopted and integrated these

19 records from third-party sources which are created by an

20 automated process and set them forth as being accurate

21 under that process.

1   Again, ma'am --

2   THE COURT: Defense concession that the

3   records were what the government said they were.

4   MR. von ELTEN: That is true, Your Honor,

5   that this would be an example of weight, not

6   admissibility, that these are not accurate before the

7   court.

8   THE COURT: Lubich cites Weinstein to talk

9   about, in general, electronic documents and records that

10   are merely stored in a computer raise no computer

11   specific authentication issues. If the computer

12   processes data rather than merely storing it,

13   authentication issues may arise. Do you consider this a

14   process or a storage?

15   MR. von ELTEN: Ma'am, I consider this a

16   storage because it was automatically collected and the

17   Internet Archive certifies that it stores records at or

18   near the time. Internet Archive doesn't process them, it

19   doesn't manipulate them. It essentially takes a picture,

20   puts it into storage and makes it accessible for a user

21   to search for it.

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 1                THE COURT:  Well, that's where again I'm
 2  confused.  Explain to me, you said Internet Archive takes
 3  the picture.
 4                MR. von ELTEN:  Yes, ma'am.
 5                THE COURT:  How does the third-party donation
 6  system work?
 7                MR. von ELTEN:  The third-party donation
 8  system as explained in Novack works by the web crawler
 9  automatically taking the picture, and the owner of the
10  web crawler donates that picture to Internet Archive.
11  That would simply be a gap that would go to weight, not
12  admissibility.
13                THE COURT:  Are you aware of any case,
14  criminal case, federal or state, that has allowed
15  admissibility of a website under Internet, under one of
16  these affidavits as self-authenticating?
17                MR. von ELTEN:  Not as self-authenticating.
18  However, in United States V Basnal cited by the United
19  States in its brief, Internet Archive results were used
20  in a criminal proceeding, and in that case they were --
21  one of the bases for admission or for authentication was
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 1   they were compared to a previously authenticated

 2   document.

 3              In this case prosecution exhibit 110 is

 4   substantially similar in content to prosecution exhibit

 5   109 and that would be offered also as corroboration of

 6   the authenticity of prosecution exhibit 109 for

 7   identification.

 8              THE COURT:  All right.  Is that in your

 9   brief?

10              MR. von ELTEN:  That detail, ma'am?

11              THE COURT:  No.  United States versus --

12   what's the case?

13              MR. von ELTEN:  B A S N A L.  Basnal.

14              THE COURT:  The cite is?

15              MR. von ELTEN:  One moment, ma'am.

16              Also in that case, ma'am --

17              THE COURT:  Can I have the cite for it,

18   please?

19              MR. TOOMAN:  We've got it, Your Honor.  We

20   can give it to them.

21              THE COURT:  I'd like to find it in the brief.
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1 I'm not seeing it.

2   MR. TOOMAN: Ma'am, it's on page four, the

3 last paragraph, in the spring cites.

4   THE COURT: Got it. Got it. Got it. Thank

5 you. So it's Basnal. Okay.

6   So in that case they compared it with another

7 similar exhibit?

8   MR. von ELTEN: Yes, ma'am. In that case the

9 evidence was put forth talking about the reliability of

10 the Internet Archive and then it was compared to another

11 exhibit for authentication purposes.

12   THE COURT: All right. Any others?

13   MR. von ELTEN: No, ma'am.

14   THE COURT: What about Telewisa?

15   MR. von ELTEN: Telewisa relied on an

16 affidavit, ma'am.

17   THE COURT: So that's not a

18 self-authenticating case?

19   MR. von ELTEN: No, ma'am.

20   THE COURT: Okay. I'm sorry. Proceed.

21   MR. von ELTEN: Yes, ma'am. The Internet

1   Archive result is relevant because it explains why PFC

2   Manning chose to compromise the information he did. PFC

3   Manning conducted searches on anything related to content

4   set forth in prosecution exhibit 109 for identification.

5   PFC Manning admitted to compromising information

6   (INAUDIBLE) as set forth there in prosecution exhibit 109

7   for identification. Mark Johnson testified PFC Manning

8   discussed mining the open source center. Mr. Johnson

9   also testified that PFC Manning conducted research on the

10 open source center related to Iceland and WikiLeaks. And

11 that is a non-hearsay purpose of explaining why PFC

12 Manning took the course of action that he did.

13   THE COURT: All right.

14   MR. von ELTEN: And PFC Manning also

15 discussed compromising JTF Gitmo information with the

16 pressassociation account that Mr. Johnson testified has

17 been associated with Mr. Julian Assange.

18   THE COURT: That was Mr. Johnson?

19   MR. von ELTEN: Yes, ma'am.

20   Finally, Your Honor, the United States has

21 evidence that PFC Manning visited these websites.

 1   Excuse me, Your Honor. The United States has

 2   evidence that PFC Manning visited these websites based on

 3   the facts listed.

 4   PFC Manning also wiped his computer in

 5   January 2010 eliminating additional evidence as Agent

 6   Mander testified.

 7   MR. TOOMAN: We'll object to that. That's

 8   pure speculation on the part of the government that the

 9   wiping of the computer eliminated any evidence.

10   THE COURT: Okay. What computer? There have

11   been a number of computers.

12   MR. von ELTEN: Mr. Johnson testified that

13   PFC Manning wiped his personal Macintosh computer.

14   THE COURT: Okay. The court will disregard

15   any reasons why. Go ahead. But it's the government's

16   theory of the case that that's why, right?

17   MR. von ELTEN: Yes, ma'am.

18   Additionally Agent Shaver testified that PFC

19   Manning used an unauthorized web browser which would make

20   him then enable him to delete his history.

21   THE COURT: On his personal computer?

1   MR. von ELTEN: On his government computer,

2 ma'am.

3   THE COURT: That was Mr. Shaver?

4   MR. von ELTEN: Yes, ma'am.

5   THE COURT: All right.

6   MR. von ELTEN: Thank you, ma'am.

7   THE COURT: Defense.

8   Can you go in the same order, please?

9   MR. TOOMAN: Yes, ma'am.

10   Your Honor, we'll begin by noting the

11 government in their brief calls this a lax standard. We

12 do not believe this is a lax standard. The government

13 bears the burden of authenticating this information

14 before it's admissible.

15   THE COURT: Well, Lubich said the standard is

16 not high, is that right?

17   MR. TOOMAN: It may have, Your Honor. That's

18 not a binding case on this court though.

19   THE COURT: It isn't?

20   MR. TOOMAN: I stand corrected. That is a

21 military case. I apologize.

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 1                  Your Honor, we think the more appropriate

 2   standard is the standard set forth in Novack.

 3                  THE COURT:  So the Novack standard is more

 4   important than the Lubich standard?

 5                  MR. TOOMAN:  We think that it's the correct

 6   standard, Your Honor.  And there are distinctions with

 7   the Lubich case that I'll be happy to discuss.  There we

 8   were talking about forensic images of computers.  That's

 9   not what we're talking about here.  We've talked about

10   forensic images.  The forensic images in this case have

11   been admitted.  The reports based on those forensic

12   images have been admitted.  That's not what the

13   government's attempting to introduce here.

14                  THE COURT:  Now, Novack, does that address

15   tweets?

16                  MR. TOOMAN:  It does not address tweets, Your

17   Honor.

18                  THE COURT:  So is that case relevant to your

19   109 argument or 31 and 32 as well?

20                  MR. TOOMAN:  Well, it's relevant to 31 and 32

21   as well, Your Honor, because those images are actually
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 1    Google cache images.  So those exhibits aren't pulled

 2    directly from Twitter.

 3               THE COURT:  I thought the witness said that

 4    he had pulled it and compared the current version with

 5    the Google cache version.

 6               MR. Von ELTEN:  The witness said that he --

 7    one way that you could pull a tweet is to go back and

 8    look at it because they're all there.  He also said he

 9    didn't do that.  So when he was explaining how you could

10    acquire this tweet, he said there are two ways, you could

11    do a search using Google cache or just Google search it

12    directly, the content of it, and that would pull it up,

13    or you can go to Twitter.  And he said what he did was

14    the first way, which the first way being use a, you just

15    search for it directly and pull it up on Google cache.

16               And, Your Honor, Mr. Mander said the same

17    thing with respect to the WikiLeaks most wanted list,

18    109.  He said he searched for WikiLeaks most wanted list

19    and pulled it up that way.  He couldn't get to it when he

20    actually went to WikiLeaks was his testimony.

21               THE COURT:  Okay.  Let's stick right now with
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1   prosecution exhibits 31 and 32. I believe I heard the

2   government argue that the witness said that he did, he

3   pulled it up through Google today and compared what he

4   got through Google today with what he got from Google

5   cache and that's not the defense's view?

6   MR. TOOMAN: Well, looking at the transcript,

7   he at one point said that he didn't do that. Now, he may

8   have also said, and I may have missed it when I was

9   reviewing it, that that's entirely possible. But he

10   definitely said there were two ways. I didn't go back

11   and go through all the tweets essentially because I

12   didn't want to go through thousands of tweets.

13   THE COURT: Okay.

14   MR. TOOMAN: So our opinion is that Google

15   cache is analogous to the Internet Archive. It has some

16   way that it grabs this information and there's no,

17   there's been no discussion of that before the court. The

18   court has no information on how Google cache does that.

19   And so from our perspective the authentication piece

20   hasn't been met with respect to Google cache. There

21   should be, there should be some authentication from

1   someone from Google who would explain, hey, this is what

2   we do.

3   THE COURT: What's the defense's position

4   with the government? The government has two different

5   authentication approaches to prosecution exhibit 31 and

6   32 versus 109. 109 they're arguing self-authenticating

7   with the affidavit. Plaintiff's exhibits 31 and 32

8   they're arguing fall under MRE 902 by distinctive

9   characteristics. What's the defense's position with

10   respect to that?

11   MR. TOOMAN: Our position is that it would

12   not be authenticated based on distinctive

13   characteristics.

14   THE COURT: Does Novack deal with distinctive

15   characteristics?

16   MR. TOOMAN: I don't believe it does, Your

17   Honor.

18   THE COURT: Okay. Why would it not be

19   admissible under distinctive characteristics?

20   MR. TOOMAN: Well, the distinction, Your

21   Honor, is a number of the factors that they talk about

 1 │ with respect to self-authenticating based on

 2 │ characteristics, that tweet talks about dot mil

 3 │ addresses. Specifically it says we want as many dot mil

 4 │ addresses. It doesn't say we want the GAL. It doesn't

 5 │ say we want the Iraq database.

 6 │   THE COURT: I think what the government has

 7 │ argued is the tweets have come from the WikiLeaks URL

 8 │ address -- what is it they argue here?

 9 │   MR. TOOMAN: Well, the tweets come from

10 │ Google cache, Your Honor. We would also point to the

11 │ case -- I'm sorry, Your Honor.

12 │   THE COURT: Go ahead.

13 │   MR. TOOMAN: We would also point to the case

14 │ cited in our brief, In Re: Home Store, which says

15 │ printouts of (INAUDIBLE) are not self-authenticating.

16 │   THE COURT: Well, so the government, as I

17 │ understood the government they're relying on distinctive

18 │ characteristics under MRE 902 which wouldn't be a

19 │ self-authenticating or an MRE 901. I get my rules mixed

20 │ up here.

21 │   MR. Von ELTEN: Distinctive characteristics,

 1 | ma'am, is 901B4.

 2 | THE COURT: 901B4. Okay. So the

 3 | government's not arguing that prosecution exhibits 31 and

 4 | 32 are self-authenticating. They haven't. Are you

 5 | saying that they have to or can they authenticate a

 6 | different way?

 7 | MR. TOOMAN: Well, certainly producing an

 8 | affidavit would be one way. We would say that they

 9 | couldn't, the distinctive characteristics here, just

10 | because it looks like it -- anyone can create a web page

11 | -- not anyone, but people certainly can create a web page

12 | that certainly looks like WikiLeaks or looks just like

13 | Twitter, and we provided in our motion to the court a

14 | number of instances where Twitter has been hacked.

15 | So we would say that based on that, the

16 | integrity of Twitter would suggest that don't just take

17 | it for face value, which is what the government's asking

18 | you to do. Hey, it was on Twitter, it must be true,

19 | authenticated. Well, Twitter can be hacked, it's easy to

20 | duplicate, so we would suggest that 901B4 wouldn't be

21 | appropriate for authentication with respect to the

 1   tweets.

 2   THE COURT: What's your position with the

 3   cases cited by the government that stand for the

 4   proposition that the possibility of alteration goes to

 5   weight, not admissibility?

 6   MR. TOOMAN: Could I have a moment, Your

 7   Honor?

 8   THE COURT: Yes.

 9   MR. TOOMAN: Your Honor, I guess we would

10   rely on sort of the general rule of authentication that

11   you have to be convinced that it is what they purport it

12   to be.

13   THE COURT: Okay. Well, would you agree that

14   the standard would be not that I find it's what the

15   government purports it to be, or a reasonable fact-finder

16   in that role finds it it be what the government purports

17   it to be.

18   MR. TOOMAN: Yes. You are the reasonable

19   fact-finder. If you're convinced, then --

20   THE COURT: I'm not there yet. Okay.

21   MR. TOOMAN: Would you like me to continue,

1 Your Honor?

2   THE COURT: Yes.

3   MR. TOOMAN: Okay. I think we've covered

4 authentication of the tweets. So we would move on to

5 authentication of prosecution exhibit 109 for

6 identification. There we believe the Novack case stands

7 for the proposition that the government needs to have an

8 affidavit not necessarily from the Internet Archive, but

9 from someone who actually has knowledge of WikiLeaks.

10 And all of this sort of ties into hearsay, there's a lot

11 of overlap, but with respect to something from the

12 Internet Archive and particularly the most wanted list,

13 this is quadruple hearsay.

14   THE COURT: Well, let's talk about

15 authentication before we get to hearsay.

16   MR. TOOMAN: Okay. We would suggest that

17 Novack stands for the proposition that someone from

18 WikiLeaks needs to testify about what was on their page

19 at a certain time. When you look at the affidavit from

20 Mr. Butler, he doesn't make any assertion that he has

21 personal knowledge of what was taken. He says all I know

1   is what the third-party gave to us.

2   And Your Honor asked a question of the

3   government about process versus storage. This is

4   definitely a process. There is a process that takes

5   place to get this data by the third-party.

6   THE COURT: Describe that process to me.

7   What is this crawling?

8   MR. TOOMAN: We don't know. Only the

9   third-party knows. I imagine that it sounds from the

10 frequently asked questions and Mr. Butler's affidavits

11 and the Novack case that third parties are getting these

12 websites somehow.

13   THE COURT: So are crawlers going from

14 Internet dot org to these third parties or do these third

15 parties have crawlers and they're crawling and then

16 they're giving things to Internet dot org?

17   MR. TOOMAN: That's our understanding. So I

18 might be interested in contributing to the Internet

19 Archive dot org, so I set up whatever process I'm going

20 to run to gather data and then I contribute it to

21 Internet Archive.

1   So there's no authentication of the process

2   this third-party is running. A third-party could do

3   anything with that information. They can gather that

4   information, they can tweak it if they wanted to and then

5   send it to the Internet Archive. The Internet Archive

6   has no idea how that data was gathered or if it was

7   manipulated at all. All they can say is Joe gave me a

8   batch of data and we added it to our archive and this is

9   what our archive says. We haven't changed what Joe or

10   Bob or Phil or whoever gave it to us, but who knows what

11   that individual did with it. And who knows the process.

12   And we would say that there is a process, that individual

13   is running a process in order to get the information.

14   THE COURT: How would you address the

15   government's contention that the reliability is enhanced

16   because you can compare prosecution exhibit 109 for

17   identification with prosecution exhibit 110 which was,

18   you could, if you go on the Internet today and that comes

19   up?

20   MR. TOOMAN: I guess if you can compare them,

21   you can compare them. I don't know that we would really

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 1   respond to that.
 2              THE COURT:  Do you think it enhances the
 3   reliability, has any impact on reliability?
 4              MR. TOOMAN:  Well, it may enhance the
 5   reliability, but I don't think it enhances the
 6   authentication.  I still think there's an authentication
 7   issue.  Because, again, we're talking about things that
 8   were pulled today, not things that were pulled back in
 9   November of 2009 as they purport them to be.  The thing
10   that is being compared is a present day version.  We've
11   gone and we have this present day version and we're
12   comparing it to what Internet Archives says or whatever
13   the process is, but in this situation we're dealing with
14   present day versions.  No one is looking at WikiLeaks in
15   2009 and telling this court what it saw in 2009.
16              THE COURT:  Well, if you pull something up
17   today and it says draft most wanted leaks of 2009 sort,
18   and then you compare it to something that is coming out
19   of this archive dot org that is also entitled draft most
20   wanted leaks of 2009 sort, wouldn't that enhance the
21   probability that it is what it purports to be?
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 1   MR. TOOMAN: It would, Your Honor.

 2   THE COURT: Okay.

 3   MR. TOOMAN: Your Honor, while we're

 4   addressing authentication, the government spoke about the

 5   process through which they acquired their affidavit and,

 6   if I could, I'd like to publish one of the attachments we

 7   provided to the court yesterday.

 8   THE COURT: Certainly.

 9   MR. TOOMAN: Your Honor, this is one of the

10   attestation certificates that the government provided to

11   the court. I believe it's from appellate exhibit 160.

12   It's pre-admitted evidence. And this wasn't an

13   attachment to our motion, but I think the court got a

14   copy yesterday.

15   THE COURT: Yes.

16   MR. FEIN: Your Honor, may I have a moment?

17   THE COURT: Yes.

18   MR. FEIN: Thank you, ma'am.

19   (DISCUSSION OFF THE RECORD.)

20   THE COURT: This is part of the government's

21   brief, is that correct?

1   Is this prosecution exhibit 160 or is this --

2   MR. TOOMAN: No, ma'am. It's appellate

3   exhibit 160. So this is one of the attestation

4   certificates the government provided during a 39A we had

5   last summer when they were pre-admitting documents and I

6   believe this one had to do with IA training that PFC

7   Manning took.

8   THE COURT: Okay. Part of the defense brief.

9   I knew I saw it. Got it.

10   MR. TOOMAN: Yes, ma'am. So we would point

11   to the attestation certificate which would be part of the

12   government brief from Mr. Butler where the government set

13   forth that this was what they did for expediency was they

14   sent Mr. Butler there. Well, expediency would be for Mr.

15   Butler to use the form that he's used to. And defense

16   would also submit this isn't the normal form that the

17   government uses. And we would just ask the court to

18   compare what Mr. Butler signs and what has previously

19   been used which we would say is normally what the

20   government uses.

21   What the government normally uses, we have

1 five paragraphs, and what Mr. Butler signed only has

2 four. Some of the language has been changed. For

3 example, in paragraph 1 of Mr. Butler's attestation there

4 is no indication that he's a custodian of these records

5 as there is in this. There is no attestation that he has

6 personal knowledge in his certificate as would be

7 required to authenticate. He doesn't say that it was

8 made in the regular practice of his duties. And he

9 doesn't say it's a complete record as is said here.

10   We'll direct the court to number five, it

11 says the records are a true, accurate and complete copy.

12 That's not what Mr. Butler says. Mr. Butler says the

13 records are true and accurate copies of the Internet

14 Archive Wayback server. Are they complete? We don't

15 know. And we'll get into the completeness a little bit

16 down the road when we talk about, when I talk about

17 hearsay.

18   And I guess just to address Your Honor's

19 earlier question about comparing the documents, we would

20 say that the issue isn't whether or not you can compare,

21 the issue is what does it look like in 2009. And nothing

1   that the court has before it tells us what any website

2   looked like in 2009 or 2010.

3   Move on to hearsay, Your Honor?

4   THE COURT: Okay.

5   MR. TOOMAN: With respect to the tweets,

6   there's an issue of, we would say, double hearsay. You

7   have a tweet from WikiLeaks, and then you have Google

8   cache saying what WikiLeaks said in their tweet. So

9   there's two levels of hearsay. And before we even get --

10   THE COURT: Well, let me ask about that. On

11   the Google cache they're pulling up just something on a

12   website. What's the authority that you're relying on to

13   say that that's hearsay, as opposed to just whatever is

14   appearing on the website?

15   MR. TOOMAN: Sure. We would say that when

16   Google cache takes it and puts it up, they are saying

17   what WikiLeaks said and here it is. This is what they

18   said at this time purportedly, so now they're making a

19   statement as to what WikiLeaks said. But really before

20   we even get there, Your Honor, we would say that these

21   aren't even statements. These are made by a corporation

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 1   or an organization.  And so a declarant has to be a

 2   person.  So this goes to --

 3                  THE COURT:  How is it hearsay?

 4                  MR. TOOMAN:  Well, this goes to state of

 5   mind, the state of mind, plan and motive.  It doesn't

 6   fall within the exception because --

 7                  THE COURT:  Well, it has to be hearsay first

 8   to get to the exception piece.  The government's

 9   purported that they're using it for a non-hearsay

10   purpose.  What's your position on that?

11                  MR. TOOMAN:  Well, I'll I address the

12   non-hearsay purposes in order.  First we have the state

13   of mind, plan or motive of WikiLeaks was I think the

14   first hearsay exception the government addressed.

15                  The plan or state of mind of WikiLeaks has

16   nothing to do with PFC Manning.  Nothing to do with him.

17   They can plan and do whatever they want.  That doesn't

18   effect PFC Manning.

19                  THE COURT:  If the government is offering

20   this most wanted list, is it, and maybe, as I understand

21   what they're saying is, well, here you're on the tweets.
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 1   Never mind. We're not talking about that

 2   yet. But the tweets are, as I understood what the

 3   government was saying, was that they were offering it for

 4   the fact that this is what WikiLeaks put out there.

 5   Whether they were actually planning on doing it or not

 6   was irrelevant. A reader could come and say, okay, this

 7   is what they're putting out there that they plan to do,

 8   so that's the relevance. Whether they actually plan to

 9   do it or not.

10   MR. TOOMAN: We understood I guess two

11   hearsay exceptions the government was relying on. One

12   was the plan, state of mind, intent on WikiLeaks, and one

13   was the effect on the listener.

14   THE COURT: Okay.

15   MR. TOOMAN: And --

16   THE COURT: Start off with the plan of

17   WikiLeaks then.

18   MR. TOOMAN: Okay. I guess another, all of

19   these are so intertwined I'm going to go back for a

20   minute to authentication and it's an idea that is going

21   to be relevant throughout this discussion, but the

1   Hopcheque or Hopchecue case the government cited in their

2   brief -- I'll give you a pinpoint cite of page 1121 with

3   respect to authentication -- that case says there has to

4   be a connection between the accused or the defendant and

5   the thing which you're trying to authenticate. And so,

6   and we'll get into the connection with PFC Manning and

7   these things when we talk about hearsay as well, but we'd

8   ask you to just consider that with respect to

9   authentication as well.

10   So first the plan, state of mind, the plan,

11   motive, state of mind of WikiLeaks.

12   THE COURT: So as I understand the defense,

13   you're understanding of what the government is doing is

14   they're offering it for hearsay and now it's a hearsay

15   exception for state of mind?

16   MR. TOOMAN: Yes. That's our understanding.

17   The state of mind of WikiLeaks has nothing to

18   do with PFC Manning. PFC Manning is not charged with

19   conspiracy. So what WikiLeaks intends to do, it doesn't

20   matter. It has no impact on PFC Manning.

21   And sort of the overarching theme of all of

1   this is, you know, did he actually see any of this? Did

2   he ever actually see it? So whether we're talking about

3   effect on the listener or authentication, there has to be

4   a connection between PFC Manning and these documents, and

5   there's not a connection between PFC Manning and these

6   documents.

7   THE COURT: Well, isn't that a question of

8   fact? Right now we're talking about admissibility of

9   things. As I understand the government's theory, this

10   provides circumstantial evidence, it was there in 2009,

11   those were the times that PFC Manning was doing the

12   searches so that's circumstantial evidence that he might

13   have seen it.

14   MR. TOOMAN: Sure. Defense's position is if

15   you're going to talk about the effect on the listener,

16   there's got to be a listener, someone has to have heard

17   it, and the person that has to have heard it is PFC

18   Manning.

19   THE COURT: I understand. And the defense's

20   position is he didn't hear it. I got that. Isn't that

21   going to ultimately be a question of fact at the end of

1   the day?

2   MR. TOOMAN: Well, it is, but the defense

3   believes that you have to resolve that piece when

4   determining the admissibility because in order to rule on

5   the hearsay exception of effect on the listener, Your

6   Honor would have to determine that there was a listener

7   and that there was enough evidence that he actually heard

8   it. Otherwise it shouldn't be admitted as not a hearsay

9   exception, but as non-hearsay.

10   THE COURT: So it's the defense's position

11   that it shouldn't be admitted as a stepping stone that

12   this is the government theory of the case, opportunity to

13   look, could have seen the statement, therefore the impact

14   was that's why he acted like he acted, that that

15   foundation, because it's a foundational piece and doesn't

16   absolutely establish the connection that it shouldn't be

17   admitted.

18   MR. TOOMAN: Right. The defense position is

19   if you're going to admit something for the non-hearsay

20   purpose of effect on the listener, you need to prove that

21   he heard it. You have to convince the reasonable

1 fact-finder, Your Honor, that PFC Manning heard it. And

2 there's --

3   THE COURT: Again, that's the fact finding

4 piece later on. Right now I'm just doing as a question

5 of law the admissibility of the document at issue.

6   MR. TOOMAN: Right.

7   THE COURT: So you're saying I need to make

8 that finding in this step, this level now, too?

9   MR. TOOMAN: Right. Our position would be

10 Your Honor needs to determine whether or not PFC Manning

11 heard it. And then if you determine that it's reasonable

12 that he heard it, then it would be, then you could admit

13 it and then make a determination based on the facts what

14 weight to give it. And so the government's pointed to

15 circumstantial evidence that PFC Manning may have seen

16 them, and our position is the circumstantial evidence

17 that he didn't see it far outweighs any circumstantial

18 evidence that he did. And I'll address those tweets in

19 turn.

20   THE COURT: Okay.

21   MR. TOOMAN: And the list. So prosecution

1   exhibit 31 is the email list. The email list -- first of

2   all, there's mountains of forensic evidence in this case,

3   particularly, you know, the government likes to point to

4   the fact that PFC Manning's machine was wiped in late

5   January. With respect to the May tweet, that evidence

6   would be there. And with respect to the dot 22 machine,

7   his primary SIPR machine, it would be there as well.

8   And so the forensic experts, Mr. Shaver and

9   Mr. Johnson, who have testified about the primary SIPR

10   and the personal Mac, they looked for anything related to

11   WikiLeaks. Anything. And they didn't find tweets on PFC

12   Manning's computer. They found all sorts of other things

13   to do with WikiLeaks. They found things to do with

14   WikiLeaks in April. So it's not an issue of him having

15   cleared his Internet history. So if he had seen the

16   tweet in May, there would be evidence of it on one of his

17   computers, and there's not.

18   And our opinion is that outweighs the fact

19   that they had had a tweet about email addresses and then

20   he downloaded email addresses. We think that the fact,

21   and I guess also relevant to this discussion is the

1 supply room computer where we had the stipulation of Mr.

2 Williamson and Mr. Williamson didn't find any references

3 to Twitter on the supply room computer where there would

4 have been. There was all sorts of other things tying

5 that computer to PFC Manning, his Gmail account,

6 purchases on Amazon, other activity that was clearly done

7 by PFC Manning, but there was no, there was no Twitter or

8 WikiLeaks on the supply room computer. And so those are

9 the computers which PFC Manning would have used to access

10 Twitter and there's nothing on there. And so our

11 position is that that outweighs the circumstantial

12 evidence provided by the government and PFC Manning

13 didn't see that tweet.

14   With respect to the next tweet, the video

15 tweet, again, no Internet history, no evidence of him

16 having viewed it in January, and the government points to

17 references in chats later in the spring. At no point

18 does PFC Manning say he gave WikiLeaks the encrypted

19 video. He never says that. He says they have it.

20   He had a number of chats with

21 pressassociation, could have learned it there.

1   In his providence inquiry he told the court

2 --

3   THE COURT: That I'm not interested in.

4   MR. TOOMAN: Okay. There are a lot of ways

5 that PFC Manning could have learned about that video.

6 The government hasn't established that he learned it from

7 the tweet. There's no forensic evidence pointing to the

8 tweet. They haven't found a Twitter account of PFC

9 Manning that shows him following WikiLeaks. And all of

10 the evidence we've heard about the Farah video has

11 pointed to a couple things.

12   First, the brigade material of this Jason

13 Katz character who has it in December of 2009 and has no

14 connection whatsoever to PFC Manning. That's where we've

15 heard about the Farah video. Someone has the same

16 version, hash value, same version as CENTCOM.

17   THE COURT: I understand all of this for your

18 closing argument. Where I'm having trouble following

19 this is we're talking with admissibility of the tweet.

20   MR. TOOMAN: Sure. Again, Your Honor, the

21 relevancy of this is conditioned upon a fact and the

1 admissibility of this evidence is based on whether or not

2 he heard it. So our position is this is something that

3 you need to determine right now.

4   THE COURT: Is it relevant that if it's there

5 at the time that he had an opportunity to hear it?

6   MR. TOOMAN: I'm sorry.

7   THE COURT: Wouldn't it be relevant, because

8 the tweet is there at the time that PFC Manning is

9 involved in WikiLeaks, that he had an opportunity to see

10 it?

11   MR. TOOMAN: No. We don't think so. We

12 think that you would have to show that he actually saw

13 it. For something to effect PFC Manning, he has to

14 actually have seen it. He has to, otherwise it can't

15 affect him.

16   THE COURT: I agree with you on that.

17   MR. TOOMAN: So that's what we think the

18 court has to determine now is did he hear it, did he see

19 it, does the evidence that we've heard --

20   THE COURT: All right. So you're saying that

21 the admissibility for -- so you're saying that the

1 opportunity to see it, it's the defense's position is

2 that that's not enough.

3   MR. TOOMAN: No. That's correct, Your Honor.

4 That's correct.

5   THE COURT: Now, the cases that you cite for

6 that, I don't remember offhand the exact name of the

7 case, but the one I'm thinking of is where, the murder

8 case where the defendant was trying to say that a

9 third-party killed the victim and wanted to introduce

10 statements from two witnesses that said that the

11 third-party made statements -- refresh my recollection on

12 that. The third-party made statements that they --

13   MR. TOOMAN: Well, Your Honor, the federal

14 case, Brandon V Villas of Maywood, there was a 1983

15 claim, and you had an alleged drug dealer, and then there

16 were two women who said, hey, are you working today or

17 allegedly said, hey, are you working today. And so what

18 the court needed to determine was whether or not the

19 officers actually heard that to determine whether or not

20 they had probable cause that he was engaged in drug

21 activity. So there the court had to figure out, did

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 1   these police officers actually hear what those women
 2   said?  If they didn't hear it, then there could have been
 3   no effect on them.
 4                   THE COURT:  I'm mixing up two cases.  I've
 5   got that case and New Mexico versus Rosales where you
 6   have the court excluded witness testimony that victim
 7   said that third-party owed him a debt.  There was no
 8   evidence that the third-party knew about the debt.
 9                   So do either of these cases address
10   opportunity?  I mean in both of these cases I think it
11   was pretty clear that the person didn't hear it.
12                   MR. TOOMAN:  Right.  I don't believe they do
13   address opportunity, Your Honor.  I believe they address
14   whether or not the person actually heard it.
15                   THE COURT:  Are you aware of any case that
16   does address that?
17                   MR. TOOMAN:  We're not, Your Honor.  And this
18   seems to us a fairly obvious proposition that for there
19   to be a listener, you've got to have heard it, so we're
20   not aware of any case.
21                   THE COURT:  Okay.
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 1              MR. TOOMAN:  With respect to, so I guess all
 2   we just talked about would apply to the WikiLeaks most
 3   wanted list as well.  And there, Your Honor, we believe
 4   there's quadruple hearsay.  You have the defense exhibit
 5   of the other version of the WikiLeaks most wanted list
 6   that has the introductory --
 7              THE COURT:  Was that introduced?
 8              MR. TOOMAN:  It was, yes, Your Honor.
 9              THE COURT:  That was defense exhibit?
10              MR. TOOMAN:  I think it was J or F.  Maybe F.
11              It's F, Your Honor.
12              THE COURT:  May I see that from the court
13   reporter as well?
14              All right.  I have it.
15              MR. TOOMAN:  So what this list makes clear is
16   that WikiLeaks wants journalists, activists, historians,
17   lawyers, police and human rights investigators to send
18   them things that they are interested in.  If there's a
19   piece of information that you know is out there that
20   exists and it would help you do whatever it is that you
21   do, send it to us and we'll add it to the list.  So this
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1 list is populated by statements from those people. And

2 then the list itself is a statement. And then the

3 third-party, whoever provided that web page to Internet

4 Archive is making the statement that this is what I saw

5 and this is what I'm telling Internet Archive. And the

6 Internet Archive is making the statement that this is

7 what WikiLeaks had on their site on whatever day.

8   THE COURT: Let's go statement by statement.

9 If you're talking about the actual statement itself, the

10 most wanted list, what these countries actually wanted, I

11 believe the government's position is it's not being

12 offered for the truth that countries really wanted that

13 stuff, it's being offered for what's being put on the

14 Internet for other people to see. And then the impact it

15 would have on PFC Manning as we talked about earlier if

16 he saw it.

17   MR. TOOMAN: Right.

18   THE COURT: So what's the defense's position

19 with that non-hearsay purpose?

20   MR. TOOMAN: That's probably a reasonable way

21 to look at that, we would say, for that first level of

1 hearsay.

2   THE COURT: So let's go to level two.

3   MR. TOOMAN: Level two. Here's where we

4 think that somebody needs to come from WikiLeaks,

5 actually comes in and authenticates this. WikiLeaks are

6 the people who have the knowledge, the personal knowledge

7 of their list. So they're the ones in our view who need

8 to authenticate it. They're the only ones who can.

9 Because there's no one who -- well, certainly someone

10 probably saw this list in November of 2009, but they've

11 not testified before this court. And so absent someone

12 who actually saw this site in 2009, it would have to be

13 WikiLeaks to come in here and say this is what our site

14 looked like in 2009.

15   THE COURT: Now, you've cited Novack

16 basically as for that proposition. Are you aware of any

17 other cases other than Novack that have gone the same way

18 that you're discussing?

19   MR. TOOMAN: There are a series of cases that

20 cite Novack, I don't know that any of them are exactly on

21 point. But the decision in Novack was reviewed on appeal

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 1   and it was upheld, at least with respect to the
 2   evidentiary rulings.
 3              THE COURT:  Now, are you aware of any cases
 4   that have gone the other way, criminal cases?
 5              MR. TOOMAN:  No, ma'am.
 6              THE COURT:  How would you distinguish the one
 7   the government is talking about?
 8              MR. TOOMAN:  The way we would distinguish the
 9   way the one the government is talking about is, again,
10   we're not talking about forensic images here.
11              THE COURT:  That's the.
12              MR. TOOMAN:  Lubich, I believe, Your Honor.
13   We think the evidence here is fundamentally different
14   than the evidence that Lubich considered.
15              THE COURT:  Not Lubich.  The Basnal case.  I
16   think you gave me the cite for it.  The government has
17   purported, and again, I just got this stack of
18   information, I haven't read everything yet, but Basnal,
19   it says they compared it with a similar exhibit.
20              MR. TOOMAN:  Right.  In Basnal they compared
21   it to something that had already been authenticated.  So
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1 here, that's not what we have here. We don't have

2 anything that's been authenticated. So if they're able

3 to authenticate the list and then pull the list off of

4 archive dot org, I guess that would work, but I don't

5 know why they would need to do that if they already had

6 an authenticated list.

7   THE COURT: And what's the third level of

8 hearsay?

9   MR. TOOMAN: The third level of hearsay is

10 the individual who collected it off of WikiLeaks and then

11 donated it to archive dot org. And we believe that that

12 person would be required to testify because they would

13 have to authenticate it with respect to did they alter it

14 in any way, the same way they would have to, anyone else

15 would have to attest this is the process I go through, I

16 normally do this, this is --

17   THE COURT: How would you distinguish that

18 from business records cases that rely on MRE 806.6 and

19 902.11 where an entity has incorporated something from

20 another entity in the course of its business? As I

21 understand the case law, that's been accepted so long as

 1   the entity giving the affidavit says this is how I do

 2   business and I routinely use records from entity B?

 3   MR. TOOMAN: Right. Well, we would say that

 4   here they haven't, they haven't authenticated, they being

 5   Internet Archive, Mr. Butler, hasn't authenticated

 6   anything that that third-party did. They don't, Mr.

 7   Butler, in all likelihood, doesn't know who that

 8   third-party even is. My guess is the cases would flush

 9   out that it would be someone you're doing business with

10   and you have some sort of relationship with, and the

11   person who is attesting would have that relationship.

12   Here Mr. Butler doesn't says he knows these

13   people, he just knows we get this information from them.

14   We don't know how it's acquired.

15   THE COURT: Well, you're getting bankrupt,

16   for example, and records of someone's checks. Someone

17   else would be giving the checks to the bank and the bank

18   is collecting the checks. What's the difference?

19   MR. TOOMAN: Well, there I think the check,

20   that would be something that speaks for itself on its

21   face. You can see the check and you can see if the check

1 had been altered. You would just by looking at it be

2 able to tell, okay, hey, this, nothing looks fishy here.

3 With these Internet Archive, with these websites, who

4 knows? You don't know. You can't look at a website and

5 tell if it's been altered in any way facially just by

6 looking at it.

7   And so, I guess finally, Your Honor, I think

8 we've --

9   THE COURT: Level one, two and three. You

10 said quadruple hearsay. What's level four?

11   MR. TOOMAN: That's Internet Archive's

12 attestation. And again, we don't think that that's

13 adequate in this case because the attestation makes clear

14 --

15   THE COURT: Level three and four are the

16 same?

17   MR. TOOMAN: No. Three is that third-party,

18 and then four is Internet Archive.

19   THE COURT: So are you really saying that

20 that's a hearsay objection or really that the

21 authentication just is not good enough?

1   MR. TOOMAN: Well, I would say it's both.

2   THE COURT: How is it hearsay? Why would it

3   be hearsay when every other authentication is not

4   (INAUDIBLE).

5   MR. TOOMAN: Internet Archive holding it out

6   and saying this is what this site said at this time,

7   that's a statement in our view.

8   THE COURT: Okay. Got it.

9   MR. TOOMAN: Finally, Your Honor, we also

10   have a relevance objection to all three of these things.

11   Really these documents, they go towards the government's

12   theory of their case, but that's all they go to. They go

13   towards the theory. They don't make a fact in

14   consequence any more likely than not.

15   THE COURT: Opportunity doesn't make a fact

16   in consequence more likely?

17   MR. TOOMAN: I'm sorry, Your Honor.

18   THE COURT: Opportunity wouldn't make the

19   fact in consequence more likely?

20   MR. TOOMAN: Whether or not PFC Manning saw

21   any of these things doesn't make it any more likely than

 1 not that he had actual knowledge that the enemy used

 2 WikiLeaks, doesn't make it any more likely that he could

 3 have known that release of this information could cause

 4 damage, it doesn't make it any more likely that this is

 5 worth some amount or another amount. And so our position

 6 is that it doesn't make any fact in consequence more or

 7 less likely.

 8   And what's interesting about that is the

 9 version of the website that the government provided, and

10 we think just looking at the version and comparing it to

11 the defense's version makes clear that all of this goes

12 to is their theory of the case. They've given you the

13 version they want you to think PFC Manning saw. But

14 there's another version, and that's the version the

15 defense has given the court that would be inconsistent

16 with their theory.

17   THE COURT: Just to make sure I understand

18 the testimony, is it defense, as I understood the

19 testimony, and correct me if I'm wrong, when you pull up,

20 or the investigator testified when he pulls up WikiLeaks

21 today you get a multiple number of these lists.

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 1                MR. TOOMAN:  I believe his testimony, Your
 2   Honor, was he couldn't get to the list when he went to
 3   WikiLeaks.  He would have to Google search WikiLeaks most
 4   wanted list 2009 and then multiple versions come up.  But
 5   when he actually goes to WikiLeaks, he couldn't find it.
 6                And so just based on that, you see multiple
 7   versions come up, the government's chosen the one that is
 8   consistent with their theory; not the one that advances a
 9   fact in evidence, the one that's consistent with their
10   theory.  It's no more likely because they're basically an
11   unsorted version and a sorted version.  The unsorted
12   version has the introductory language that talks about
13   WikiLeaks mission and wanting to have political impact
14   and things like that.  That's the one that talks about,
15   that really talks about the state of mind and the intent
16   and the plan of WikiLeaks.  That's not the version the
17   government's offered because that's not consistent with
18   their theory that WikiLeaks --
19                THE COURT:  I understand that.
20                MR. TOOMAN:  So it doesn't go to a fact in
21   evidence.  The government should have introduced both
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 1   versions if they think he had just as likely an

 2   opportunity to see the unsorted version as he had the

 3   sorted version.

 4                   THE COURT:  That's why we have an adversarial

 5   process, right?

 6                   MR. TOOMAN:  Yes, ma'am.  Absolutely.  To us

 7   though it's clear that it doesn't go to any fact in

 8   evidence, or it doesn't go to making something more or

 9   less likely, it just goes to their theory of the case,

10   and that's not the basis for admissibility.  It has to

11   make a fact in consequence more or less likely.  And the

12   list and the tweets, they don't do that.

13                   THE COURT:  Thank you.

14                   MR. TOOMAN:  Thanks, ma'am.

15                   THE COURT:  Government, any final reply?

16                   MR. Von ELTEN:  Yes, ma'am.

17                   THE COURT:  I'd also ask you to distinguish

18   Novack.

19                   MR. Von ELTEN:  May I have a moment, Your

20   Honor?

21                   THE COURT:  Yes.
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 1   MR. Von ELTEN: Would you like me to start by

 2 distinguishing Novack?

 3   THE COURT: Yes.

 4   MR. Von ELTEN: First of all, ma'am, Novack

 5 admits the reliability of Internet Archive results for

 6 the availability of information to the public in prior

 7 art cases, so what is known about the originality of a

 8 patent claim.

 9   Novack sits apart from other cases in its

10 skeptical treatment of electronic evidence and the

11 Internet Archive in particular. The United States has

12 provided other cases where the Internet Archive has been

13 relied on in adversarial proceedings based on -- defense

14 has cited where affidavits have been sufficient to

15 justify the reliability of the Internet Archive.

16   THE COURT: I think I asked you earlier if

17 any criminal cases that you were aware of that allowed

18 Internet Archive and you gave me one.

19   MR. Von ELTEN: Yes, ma'am. That's the only

20 one I'm aware of, ma'am.

21   Ma'am, Google cache or any automatically

1 generated result is a machine generated process and it's

2 not hearsay any more than a photograph.

3   The defense has submitted evidence in its

4 brief attesting to the reliability of the Internet --

5   THE COURT: Let me go back. You talked about

6 Google cache is automatically generated and the result is

7 not hearsay. I believe the defense's position to me was

8 it is a statement by Google cache basically saying that

9 what I am pulling up is, in fact, what was there in 2009.

10   MR. Von ELTEN: Ma'am, it's akin to server

11 logs. Google cache just says this is a recent version as

12 Google has found, so it's akin to server logs. They just

13 automatically generate the results based on the automated

14 process.

15   THE COURT: Okay.

16   MR. Von ELTEN: But as for the evidence that

17 the defense has provided to the authenticity, enclosure

18 one, I believe, of the defense brief. I will address

19 Google cache and the Wayback machine separately, although

20 most of the information applies to both.

21   Both the Google cache and the Wayback machine

1 contain information at only one point in time. Google

2 cache let's you know the page that you are viewing is

3 only a snapshot of how a page is when it looked at a

4 specific time. Further, the enclosure states the Wayback

5 machine keeps multiple copies of the same capture on

6 different days. Again, ma'am, that is what the United

7 States is offering that for. And finally, I quote, for

8 any of the cash services you are essentially looking at a

9 window of what occurred, end quote.

10   The defense has raised concerns --

11   THE COURT: Let me ask another question on

12 that and I'll ask the defense this too. This enclosure

13 talks about webs being sort of streaming. You know, if

14 you're watching CNN it changes every minute, they got a

15 new story now, and then you pull it up a minute later and

16 that story disappeared and they have a new one at the

17 top. Is that the same thing we're talking about when

18 we're talking about these lists? Are they fixed

19 documents or things constantly changing on the screen?

20   MR. Von ELTEN: Yes, ma'am, a document as it

21 exists on a web page can be changed. However, in this

 1   case, prosecution exhibit 109 for identification is a

 2   snapshot of what the document looked like in November of

 3   2009. Prosecution exhibit 110 is a snapshot of the

 4   document as it exists today. As defense has pointed out,

 5   the introductory language has been changed, but much of

 6   the content is substantially the same.

 7   THE COURT: What's your position with respect

 8   to defendant's exhibit Foxtrot? This also exists today.

 9   If I compare it to prosecution exhibit 109, it's not the

10   same.

11   MR. Von ELTEN: No, ma'am, it's not exactly

12   the same, but there are substantial overlap. And that

13   overlap authenticates that this is how it existed back

14   then. The United States has provided independent

15   evidence through the Internet Archive that that is how it

16   existed back then, and changes have been made in the

17   interim, but the fact that a few changes have been made

18   also authenticates the document.

19   THE COURT: All right.

20   MR. Von ELTEN: Defense raised the content of

21   the affidavit. Ma'am, I'd just like to point out the

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 1   elements on that attested personal knowledge, that the

 2   information was captured at or near the time, was part of

 3   regularly conducted activity, and that they were true and

 4   accurate copies.  But makes it a business record.

 5   Furthermore, Your Honor, there is case law to support

 6   where a business integrates documents that those qualify

 7   as records of the organization actually holding them,

 8   United States versus Debonay.

 9              THE COURT:  Is that in your brief?

10              MR. von ELTEN:  No, ma'am, it's not.

11              THE COURT:  Okay.  What's the cite for

12   Debonay?

13              MR. von ELTEN:  28 M.J. 929.

14              United States also points to --

15              THE COURT:  Is that a (INAUDIBLE) case?

16              MR. von ELTEN:  No, ma'am, that is a United

17   States Marine Corps Court of Military Review.

18              THE COURT:  What year?

19              MR. von ELTEN:  1989.

20              THE COURT:  Okay.

21              MR. von ELTEN:  And also a Fifth Circuit
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1 case, United States versus Orich, which is a 1978 case.

2 I have a copy for the court and the defense, ma'am.

3   THE COURT: Thank you.

4   MR. von ELTEN: May I approach?

5   THE COURT: Yes.

6   MR. von ELTEN: Furthermore, ma'am, there's

7 no evidence of tampering or intent to tamper. And

8 prosecution exhibit 109 is a different list from

9 prosecution exhibit -- 109 for identification is a

10 different list from prosecution exhibit 110. And the

11 defense has offered no evidence that prosecution exhibit

12 109 for identification has changed. The arguments that

13 they make (INAUDIBLE).

14   And to clarify one additional fact, ma'am,

15 Agent Shaver testified PFC Manning used Mozilla Firefox

16 on his SIPRNET computer which was configured to delete

17 browsing history. He has not testified regarding the

18 NIPR computer to which PFC Manning had access.

19   THE COURT: Wait a minute. Say that one more

20 time.

21   MR. von ELTEN: Agent Shaver testified that

1 PFC Manning used Mozilla Firefox on his SIPRNET computer.

2 Agent Shaver testified that the Firefox browser was

3 configured to delete browsing history.

4   THE COURT: And this is, had Mozilla on which

5 computer?

6   MR. von ELTEN: On his SIPRNET computer.

7 Agent Shaver has not testified concerning the NIPR

8 computer to which PFC Manning had access to in the SCIF

9 where PFC Manning worked.

10   THE COURT: And that is relevant why?

11   MR. von ELTEN: I just wanted to clarify what

12 I told you earlier, Your Honor.

13   MR. MORROW: If I could, Your Honor, he just

14 misspoke earlier, so we're clarifying.

15   THE COURT: Okay.

16   MR. von ELTEN: Finally, Your Honor, the

17 defense raises arguments regarding the weight of the

18 evidence, not the admissibility, and should present that

19 evidence in the case in chief.

20   Thank you.

21   THE COURT: Hold on just a minute.

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 1              MR. von ELTEN:  Yes, ma'am.

 2              THE COURT:  MRE 902.11 requires the

 3   certificate to state that the record was made at or near

 4   the time of the occurrence of the matter set forth by or

 5   with information transmitted by a person with knowledge

 6   of those matters.  How does the attestation from archive

 7   dot org say that?

 8              MR. Von ELTEN:  Ma'am, the attestation says

 9   that the records were created in Internet archives

10   results at or near the time.  Paragraph two.  To the best

11   of the electronic systems involved and accurately record

12   and reflect, such files were captured at or near the time

13   the date reflected in the URL.

14              THE COURT:  This is where I'm confused again.

15   This crawling process, is Internet dot org crawling or is

16   a third-party crawling?

17              MR. von ELTEN:  Internet Archive is attesting

18   that the documents were captured at the time reflected in

19   the URL.

20              THE COURT:  Captured by Internet dot org or

21   captured by someone else?
```

1   MR. von ELTEN: Either system, ma'am.

2   THE COURT: So it could be a donated,

3   something donated as well?

4   MR. von ELTEN: Yes, ma'am. But Internet dot

5   org relies on those and integrates them into their

6   records. And, ma'am, the defense has presented no

7   evidence that prosecution exhibit 109 for identification

8   was donated.

9   THE COURT: Well, you haven't presented any

10   that this was captured by Internet Archive, have you?

11   MR. von ELTEN: We have the affidavit.

12   THE COURT: It says were captured or were

13   received by a third-party. So we don't know really.

14   MR. von ELTEN: There's no definitive

15   evidence, ma'am.

16   THE COURT: Defense, any final words? Well,

17   the government has the final words, but any further

18   words?

19   MR. TOOMAN: Yes, ma'am.

20   I believe you wanted us to address whether or

21   not the list or the web is a fixed document.

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 1              THE COURT:  Yes.  I mean do you see the
 2   distinction here?  As I'm looking, is this a streaming
 3   video, is this like prosecution exhibit 109 for
 4   identification, when you pull it up, is it like CNN, it
 5   changes, something drops off at the end and something new
 6   comes up in the beginning?
 7              MR. TOOMAN:  Well, we don't know, Your Honor.
 8   We would say that based on defendant's exhibit Foxtrot,
 9   that would suggest that this is a list that is being
10   added to.  There's the opportunity to add things to it.
11   And so in our mind that would make it a live document.
12   Things could get added later, maybe they'd get something
13   and then take it off, so we don't know.  But certainly
14   the introductory language would suggest that it is a
15   living document that's going to change over time.
16              THE COURT:  Okay.
17              MR. TOOMAN:  If I may publish, Your Honor,
18   the affidavit the defense received from Mr. Butler.
19              THE COURT:  Certainly.  That would be, for
20   the record, enclosure ten to your brief?
21              MR. TOOMAN:  Yes, ma'am.  I will zoom in here
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on paragraph seven. And paragraph seven of this says

that for the year 2009 Internet Archive largely, and I'm

not quoting here, but it mostly relied on third parties

to donate. Third parties were the ones making the

donations. So in this case we don't know. It's possible

that Internet Archive could have done it, but it's more

likely that it would have come from a third-party. And

this attestation says that these were, they don't know if

the person who got it has personal knowledge. The last

sentence there of paragraph seven, do not affirm that

these archives were, or people with the knowledge of the

information recorded therein. So we would say that it

fails the 211 analysis. And that's in part because the

snapshot that these archives give us are just that,

they're a snapshot, and we don't know whether or not the

process by which they were acquired is valid because

we're not hearing from those people.

The government referenced Mozilla Firefox and

deleting browsing history. Your Honor, I don't recall if

we asked Agent Shaver this question, but if we didn't,

we'll ask him the next time he's on the stand and he'll

1   tell us that deleting Internet history in Mozilla Firefox

2   is a default setting. So if he hasn't already said it,

3   he will say it.

4   THE COURT: I don't recall him saying it.

5   That doesn't necessarily mean it's not on the record.

6   MR. TOOMAN: I don't recall him saying it

7   either, but I'm proffering to you he will say it the next

8   time he's on the stand.

9   THE COURT: So the web deleting history is

10   the default setting?

11   MR. TOOMAN: The government just brought up

12   that Mozilla Firefox was set up to clear browsing

13   history.

14   THE COURT: I got it. Government, do you

15   agree with that?

16   MR. MORROW: Yes, Your Honor. It was

17   configured to delete browsing history, and we would agree

18   that that may or may not be the default assist setting.

19   THE COURT: They're saying it is the default

20   setting. You're saying it may or may not be.

21   MR. MORROW: I don't recall if that's the

1 default setting of Mozilla. It could be. But the point

2 is the history doesn't exist because it was configured

3 that way.

4   THE COURT: All right. You all can ask him

5 the question.

6   MR. TOOMAN: Yes, ma'am. We've only done a

7 very brief review of the Debonay case, but we would point

8 out that that is the check case, like Your Honor

9 mentioned, and we think we've addressed the differences

10 there. With the check you can kind of look at it and

11 see. And also, that was, it appeared that that was kind

12 of a normal thing, like these people would always send

13 checks and so, again, there was that understanding of how

14 the system was working.

15   Here with Internet dot org or archive dot org

16 it's an ad hoc process. You have someone, maybe you

17 decide one day I'm going to do it and I give them some

18 stuff and I decide I don't want to do it any more. So

19 Internet Archive dot org doesn't have any knowledge of

20 the process.

21   THE COURT: Assume what you said is correct

1 now. Would that have any bearing on the validity of

2 what's there if it may not be complete? You may not be

3 able to go back to January 1 of 2009 and see every

4 website that's in existence, but does that mean the ones

5 you can see have reliability issues?

6   MR. TOOMAN: We think it does. The person

7 who actually took the site, you have to have someone with

8 personal knowledge. And certainly Internet Archive has

9 personal knowledge of what someone gave them. And they

10 can tell you all day this is what Bill gave or whoever

11 gave us, but they can't say that the process they used

12 was a valid process or stuff hasn't been tampered with.

13   Subject to your questions, ma'am.

14   THE COURT: I think I just asked them. Thank

15 you.

16   Government, any last words?

17   MR. von ELTEN: Yes, ma'am. The attestation

18 highlighted by defense also says that the archive data

19 obtained from the third-party organizations was, quote,

20 captured by automated electronic systems, end quote.

21   THE COURT: You're reading paragraph seven

77

1 again?

2   MR. von ELTEN: Yes, ma'am.

3   THE COURT: All right. Anything else?

4   MR. von ELTEN: No, ma'am.

5   THE COURT: All right. I believe we

6 discussed yesterday that we will be holding a status

7 conference on Tuesday at 0930 and the plan will be then

8 to proceed with additional taking of evidence on

9 Wednesday at 0930. Is that the understanding of the

10 parties?

11   MR. FEIN: Yes, ma'am.

12   MR. COOMBS: Yes, Your Honor.

13   THE COURT: Is there anything else that we

14 need to address that's going to disturb that?

15   MR. FEIN: No, ma'am.

16   MR. COOMBS: No, ma'am.

17   THE COURT: Anything else we need to address

18 at all before we recess the court?

19   MR. FEIN: No, ma'am.

20   MR. COOMBS: No, ma'am.

21   THE COURT: Court is in recess.

United States vs.
PFC Bradley E. Manning

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